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# FIRST DEPARTMENT

## ADMINISTRATIVE LAW, MUNICIPAL LAW, CONSTITUTIONAL LAW, HUMAN RIGHTS LAW.

THE NYC ADMINISTRATIVE RULES PLACING CERTAIN RESTRICTIONS ON EXPRESSIVE MATTER VENDORS IN CITY PARKS ARE VALID AND ENFORCEABLE.

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Kapnick, determined that the restrictions placed on expressive matter vendors' (EMV's) use of public parks were valid and enforceable. "Expressive matter is defined as 'materials or objects with expressive content, such as newspapers, books or writings, or visual art such as paintings, prints, photography, sculpture, or entertainment' ...": "... DPR [NYC Department of Parks and Recreation] published proposed revisions to the rules applicable to EMVs. It held a public hearing, and based on comments at the hearing as well as written comments, revised the proposed rules. ... Under the revised EMV Rules, while EMVs may sell in almost all City parks if they comply with certain requirements, they are restricted in Union Square Park, Battery Park, High Line Park, and portions of Central Park below 86th Street, where they may only sell their items, on a first-come, first-serve basis, in certain designated areas, and only one vendor is allowed to sell at each spot. The EMVs may always sell in the nonenumerated areas, including other City parks and sidewalks. * * * I. The EMV Rules do not conflict with the City Council's legislative intent, as expressed in Local Law No. 33 of 1982. * * * II. The EMV Rules do not violate vendors' rights under the New York Constitution. * * * III. Defendants are entitled to summary judgment dismissing the discrimination claims under the State and City Human Rights Law. * * * IV. Supreme Court erred in granting plaintiffs leave to amend to add a separation of powers claim. * * *" ***Dua v. New York City Dept. of Parks & Recreation*, 2019 N.Y. Slip Op. 06154, Fourth Dept 8-20-19**

## CIVIL PROCEDURE, EVIDENCE.

DEFENDANT DOCTOR'S MOTION TO CHANGE THE VENUE OF THE MEDICAL MALPRACTICE ACTION FROM BRONX TO WESTCHESTER COUNTY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, TWO-JUSTICE DISSENT.

The First Department, reversing Supreme Court, over a two-justice dissent, determined defendant doctor's (Goldstein's) motion to change the venue of this medical malpractice action from Bronx to Westchester County should not have been granted. The majority held the burden was on Goldstein to demonstrate the need for a change of venue and that burden was not met: "Plaintiff commenced this medical malpractice action in Bronx County, alleging that defendants were negligent in rendering podiatric care and treatment to her between April and September 2016. Defendants moved and cross-moved to transfer venue to Westchester County. WestMed and Rye submitted an affidavit of their medical director averring that Dr. Goldstein was one of their employees in Westchester. Dr. Goldstein submitted an affidavit averring that he had offices in Bronx County and Westchester County. He indicated that Westchester County was where his principal place of business was located because that was where he spent the majority of his time. However, he also averred that he maintained privileges at St. Barnabas Hospital and supervised podiatric residents at two St. Barnabas Hospital clinics where approximately 150 patients per month were seen. He averred that in addition he saw approximately 20-25 patients per week at a Bronx Park Medical pavilion located at 2016 Bronxdale Avenue in the Bronx. Plaintiff is suing not only Westmed Medical Group, P.C. and Rye Ambulatory Surgery Center, LLC, but Dr. Goldstein individually. Since Dr. Goldstein is a party to the lawsuit, venue is proper in the county where he may be said to reside. CPLR 503(a) provides that the place of trial 'shall be in the county in which one of the parties resided when it was commenced,' and, insofar as relevant here, '[a] party resident in more than one county shall be deemed a resident of each such county' ... . Dr. Goldstein may also be viewed as an individually-owned business, and thus a resident of any county in which he has a principal office (CPLR 503[d]). Thus, an individually-owned business, much as a partnership, may be deemed a resident of the county where it has its principal office, as well as any county in which the individual owner being sued resides ... . Siegel notes that the 'principal office' county is an alternative; venue may still be based on the residence of natural-born parties ... . Applying these principles, Dr. Goldstein's affidavit, attesting to residency in Westchester County but devoid of supporting documentation of residency, was insufficient to prove that plaintiff's designation of Bronx County as venue was improper ...". ***Lividini v. Goldstein*, 2019 N.Y. Slip Op. 06150, Fourth Dept 8-20-19**

# SECOND DEPARTMENT

## ATTORNEYS, APPEALS.

PARTY AND ITS ATTORNEYS ORDERED TO PAY SANCTIONS FOR FAILING TO INFORM THE APPELLATE COURT OF THE SETTLEMENT OF ACTIONS ON APPEAL,

The Second Department imposed sanctions on a party and its attorneys for failure to inform the appellate court of the settlement of matters on appeal: "... Gross Polowy, LLC, trial counsel for the respondent, is directed to pay a sanction in the [*2] sum of $1,000 to the Lawyers' Fund for Client Protection of the State of New York ... . ... Day Pitney, LLP, appellate counsel for the respondent, is directed to pay a sanction in the sum of $250 to the Lawyers' Fund for Client Protection of the State of New York ... . ... Bank of New York Mellon is directed to pay a sanction in the sum of $500, and shall deposit the sum of $500 with the Clerk of this Court for transmittal to the Commissioner of Taxation and Finance ...". ***Bank of N.Y. Mellon v. Smith*, 2019 N.Y. Slip Op. 06228, Second Dept 8-13-19**

## CIVIL PROCEDURE, EVIDENCE.

DEFENDANTS DID NOT SUBMIT THEIR CERTIFICATE OF INCORPORATION AND THE PRINTOUT FROM THE DEPARTMENT OF STATE WAS NOT IN ADMISSIBLE FORM; DEFENDANTS' MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to change venue was not supported by admissible evidence and should have been denied: " 'To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper' ... . To succeed on their motion here, the defendants were obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in Kings County ... . Only if the defendants made such a showing were the plaintiffs required to establish, in opposition, via documentary evidence, that the venue they selected was proper ... . Here, the defendants failed to submit their certificate of incorporation. Contrary to the defendants' contention, the computer printout they submitted in support of their motion from the website of the New York State Department of State, Division of Corporations was inadmissible, since it was not certified or authenticated, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record ... . Therefore, the defendants failed to meet their initial burden of demonstrating that their principal office was located in Nassau County and that the plaintiffs' choice of venue in Kings County was improper ...". ***O.K. v. Y.M. & Y.W.H.A. of Williamsburg, Inc.*, 2019 N.Y. Slip Op. 06156, Second Dept 8-21-19**

## CIVIL PROCEDURE, TRUSTS AND ESTATES.

ALTHOUGH THE MEDICAL MALPRACTICE ACTION WAS COMMENCED IN DECEDENT'S NAME AFTER DECEDENT HAD DIED, THE ACTION WAS NOT A NULLITY AND WAS PROPERLY REVIVED WITHIN SIX MONTHS PURSUANT TO CPLR 205(a); SUPREME COURT SHOULD NOT HAVE DISMISSED THE COMPLAINT.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court and ruling on some issues of first impression, determined plaintiffs' medical malpractice action should not have been dismissed. The decision is too detailed and comprehensive to be fairly summarized here. The medical malpractice action was started in 2013 in decedent's name three months after decedent's death. Supreme Court erroneously declared that action a nullity. The order dismissing the 2013 action did not include the reasons for the dismissal as is required by the statute. In a later order, Supreme Court attempted to supply the missing reason as "neglect to prosecute." The Second Department held that the 2013 action was not a nullity and it was properly revived within six months of the dismissal. The subsequent attempt to provide the reason for the dismissal as "neglect to prosecute," which would preclude reviving the action within six months, was ineffective. The Second Department's summary of its holding states: "The plaintiff, pursuant to CPLR 205(a), was entitled to commence this action upon the termination of the 2013 action. The order dated November 6, 2015, directing the dismissal of the 2013 action did not set forth on the record a specific pattern of conduct constituting a neglect to prosecute required by CPLR 205(a) to preclude the commencement of subsequent litigation against the defendants, the plaintiff's nonviable substitution motion does not constitute evidence of neglect to prosecute, and the erroneous naming of the decedent as a plaintiff in the 2013 action does not preclude the application of CPLR 205(a). In addition, CPLR 5019(a) is inapplicable, as the June 6, 2016, order cannot be utilized to substantively change the order dated November 6, 2015. Accordingly, the judgment entered August 23, 2016, is reversed, on the law, the complaint is reinstated ...". ***Sokoloff v. Schor*, 2019 N.Y. Slip Op. 06176, Second Dept 8-21-19**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT SHOULD NOT HAVE BEEN DESIGNATED A PREDICATE SEX OFFENDER BASED UPON A MICHIGAN CONVICTION OF "BREAKING AND ENTERING AN OCCUPIED DWELLING WITH THE INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE."

The Second Department determined defendant should not have been classified as a predicate sex offender based upon a Michigan conviction of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct in the second degree: "Supreme Court should not have, in effect, designated the defendant a predicate sex offender based upon his 1983 Michigan conviction. Where the prior conviction was in a jurisdiction other than New York State, the offense in the other jurisdiction must include all of the essential elements of a crime enumerated as a 'sex offense' or 'sexually violent offense' in the Correction Law or must require registration as a sex offender in the jurisdiction in which the conviction occurred ... . Although the crime of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct in the second degree in Michigan is equivalent to the offense of burglary in the second degree in New York ... , burglary is not classified by the Correction Law as a 'sex offense' or a 'sexually violent offense' ... , and the People did not rely on the 1983 Michigan conviction as constituting a sexually motivated felony. Moreover, the crime of which the defendant was convicted in 1983 is not considered a sex offense requiring registration as a sex offender in Michigan ... . Accordingly, the designation of the defendant as a predicate sex offender was improper ...". ***People v. Smith*, 2019 N.Y. Slip Op. 06181, Second Dept 8-21-19**

## ENVIRONMENTAL LAW, CONTRACT LAW, EVIDENCE.

TRIAL EVIDENCE SUPPORTED THE RULING THAT TWO FACIALLY AMBIGUOUS RELEASES EXECUTED BY THE PRIOR OWNER OF THE GAS STATION APPLIED TO THE CONTAMINATION OF THE PROPERTY BY LEAKED GASOLINE; THE CURRENT OWNER OF THE GAS STATION COULD NOT, THEREFORE, RECOVER THE CLEANUP COSTS FROM THE DEFENDANT GASOLINE SUPPLIER.

The Second Department determined the trial evidence supported the ruling that two facially ambiguous releases executed by the (a gasoline supplier) and the former owner of the gas station precluded an action by plaintiff, the current owner of the gas station, to recover from defendant plaintiff's expenditures for the cleanup of leaked gasoline.: "Where a releasee asserts a lack of liability based upon a general release, the burden of proof is on the releasor to show that 'the general language of the release, valid on its face and properly executed, is to be limited because of a mutual mistake, or otherwise does not represent the intent of the parties' ... . ' [I]t is not a prerequisite to the enforceability of a release that the releasor be subjectively aware of the precise claim he or she is releasing' … . Thus, at a trial encompassing an assertion by a defendant that it is not liable for the damages claimed by the plaintiff due to a general release that contains equivocal language, rendering it ambiguous on its face, the plaintiff must be afforded an opportunity to establish that the releases were not intended to deprive him or her of the claimed damages ... . Here, although the releases were ambiguous on their faces as to whether they encompassed unknown claims for environmental contamination, the plaintiff failed to adduce evidence at the trial sufficient to support a finding that they did not, whereas the defendant adduced evidence showing that the releases were intended to be general releases." ***Burnside 711, LLC v. Amerada Hess Corp.*, 2019 N.Y. Slip Op. 06165, Second Dept 8-21-19**

## FORECLOSURE, CIVIL PROCEDURE.

MORTGAGE WAS NOT ACCELERATED UNTIL THE FORECLOSURE ACTION WAS COMMENCED IN OCTOBER 2016; ACTION FOR THE INSTALLMENT PAYMENTS MISSED DURING THE SIX YEARS PRIOR TO OCTOBER 2016 IS TIMELY.

The Second Department, reversing Supreme Court, determined the mortgage was not accelerated until the foreclosure action was commenced in October, 2016. Therefore the action was not time-barred, except for the mortgages payments due but not paid more than six years prior to October 2016 (missed payments prior to October 2010): "... [C]ontrary to the defendant's contention, he did not establish that the complaint should be dismissed on statute of limitations grounds through the notices sent to the defendant in February 2009 and May 2009, as those notices did not accelerate the mortgage. The notices indicated that acceleration was a possible future event, but did not constitute an exercise of the mortgage's acceleration clause ... . Rather, the mortgage was only accelerated in October 2016, when the plaintiff served the foreclosure complaint on the defendant seeking immediate payment of the balance of the principal indebtedness. Thus, the Supreme Court should not have granted dismissal of the complaint in its entirety as time-barred. Specifically, the defendant failed to show that the causes of action in the complaint, insofar as they relate to unpaid mortgage installments which accrued within the six-year period immediately preceding the plaintiff's October 2016 commencement of this foreclosure action, to wit, the unpaid installments which accrued on or after October 6, 2010, were time-barred ... . However, where, as here, the mortgage was payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due' ... . Therefore, since the plaintiff alleged that the defendant made his last payment on mortgage in January 2009 and this action was not commenced until October 6, 2016, the defendant established that any unpaid installments of the mortgage which accrued before the six-year period prior to

the plaintiff's commencement of this mortgage foreclosure action, to wit, unpaid installments from January 2009 through October 5, 2010, are time-barred ...". ***Ditech Fin., LLC v. Reiss*, 2019 N.Y. Slip Op. 06208, Second Dept 8-21-19**

## MEDICAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY, WRONGFUL DEATH.

PLAINTIFF ALLEGED A NEW THEORY OF LIABILITY FOR THE FIRST TIME IN ANSWER TO DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION; SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S SUMMARY JUDGMENT MOTION AND SHOULD NOT HAVE ALLOWED PLAINTIFF TO AMEND THE COMPLAINT AND BILL OF PARTICULARS TO REFLECT THE NEW THEORY.

The Second Department, reversing Supreme Court, determined defendant doctor's motion for summary judgment in this medical malpractice action should have been granted. Instead of answering the defendant's expert opinion that the doctor's actions were not the cause of the amniotic fluid embolism (AFE) which plaintiff alleged caused the death of plaintiff's decedent, the plaintiff for the first time alleged the cause of death was septic shock, not AFE. Supreme Court erroneously denied defendant's motion for summary judgment and allowed plaintiff to amend the complaint to allege the new theory: "... [T]he defendant met his prima facie burden as to proximate cause by submitting the affidavit of an expert in maternal fetal medicine, who opined that any delay in the decedent undergoing an abortion procedure from the second trimester to the third trimester did not cause her to develop AFE. In opposition, the plaintiff did not raise a triable issue of fact as to the defendant's prima facie showing, but rather alleged, for the first time, a new theory of causation, claiming that the decedent died of septic shock, not AFE. 'A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars' ... . ... '[O]nce discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances' ... . Here, the plaintiff failed to show special and extraordinary circumstances in seeking leave to amend the complaint and the bill of particulars in response to the defendant's motion for summary judgment, three years after the commencement of the action and almost six months after the filing of the note of issue. The plaintiff offered no reasonable excuse for relying solely on the medical examiner's report and for failing to explore his new theory of causation earlier in the proceedings ... . Moreover, permitting the amendment at this late stage of the proceedings would prejudice the defendant." ***Anonymous v. Gleason*, 2019 N.Y. Slip Op. 06207, Second Dept 8-21-19**

## PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANT TRANSIT AUTHORITY'S NEGLIGENCE FURNISHED THE CONDITION FOR PLAINTIFF'S DECEDENT'S DEATH BUT WAS NOT THE CAUSE OF HIS DEATH, DEFENDANT'S MOTION TO SET ASIDE THE SUBSTANTIAL VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the substantial plaintiff's verdict in this wrongful death case should have been set aside. It was alleged that the NYS Transit Authority was negligent in failing to make sure all passengers were off the subway train when the train reached the end of the line, requiring that it be repositioned in the relay tunnel. Plaintiff's decedent, who was intoxicated, remained on the train. At some point he fell from the train in the relay tunnel and was killed: "... [V]iewing the evidence in the light most favorable to the plaintiffs, there is no valid line of reasoning and permissible inferences which could possibly lead rational people to conclude that the defendants' alleged negligence was a proximate cause of the decedent's injuries and death ... . Even assuming that the defendants' employees were negligent in failing to remove the decedent from the train before it was taken into the subject relay tunnel, the defendants' negligence merely furnished the condition or occasion for the occurrence of the decedent's fall from the train ... rather than being one of its proximate causes. While the record evidence supports the plaintiffs' theory that the decedent was in the area between the two northernmost subway cars when he fell to the tracks below, the circumstances that led the decedent to be in that area, and the cause of the fall itself, remain unknown and, therefore, speculative ...". ***Williams v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 06187, Second Dept 8-21-19**

## PERSONAL INJURY, CONTRACT LAW.

QUESTIONS OF FACT WHETHER THE "LAUNCH AN INSTRUMENT OF HARM" ESPINAL EXCEPTION APPLIED TO A CONTRACTOR AND WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF THE CONDITION ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL.

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant contractor launched an instrument of harm in this slip and fall case. Plaintiff alleged she tripped on a piece of masonite that had been placed over concrete that had just been poured. There was also a question of fact whether the property owner had constructive notice of the condition: "The ... defendants' submissions failed to eliminate all triable issues of fact as to whether Howell launched a force or instrument of harm through the failure to exercise reasonable care when its employee laid the subject masonite over the area of the floor where the self-leveling concrete had been poured ... . ... The evidence proffered by the ... defendants failed to demonstrate, prima facie, that the [defendants] lacked constructive notice of a hazardous condi-

tion on the premises. During an examination before trial, [defendant's] operations director was asked about his inspection tour of the mall on the morning of the plaintiff's fall. His repeated descriptions of what he 'normally would' do and 'probably would have' done are ambiguous as to whether he is describing a specific inspection, or merely describing general inspection policies and practices ...". ***Pinto v. Walt Whitman Mall, LLC*, 2019 N.Y. Slip Op. 06157, Second Dept 8-21-19**

## PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF WAS WALKING IN THE CROSSWALK WHEN SHE WAS STRUCK BY DEFENDANT'S BUS MAKING A RIGHT TURN; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURE AND SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian traffic accident case should have been granted. Plaintiff was in the crosswalk when she was struck by defendant's bus making a right turn: "The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting her own affidavit and a certified copy of the police accident report, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendants' vehicle failed to yield the right-of-way and struck her ... . In opposition, the defendants failed to raise a triable issue of fact as to as to whether there was a non-negligent explanation for striking the plaintiff. Furthermore, the plaintiff's motion was not premature, as the defendants failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff ...". ***Rodriguez-Garcia v. Bobby's Bus Co., Inc.*, 2019 N.Y. Slip Op. 06221, Second Dept 8-21-19**

## TAX LAW, MUNICIPAL LAW, DEBTOR-CREDITOR.

FAILURE TO PAY TAXES UNDER PROTEST PRECLUDES AN ACTION TO RECOVER THE PAYMENTS WHEN THE RELEVANT TAX RULE IS INVALIDATED.

The Second Department determined plaintiff's putative class action to have Nassau County disgorge fees collected pursuant to the Nassau County Administrative Code for tax map certification letters issued by the County Clerk for real estate closings was properly dismissed. It is not explicitly stated, but apparently the taxing rule under which the fees were collected had been invalidated at some point: " 'The settled law is that the payment of a tax or fee cannot be recovered subsequent to the invalidation of the taxing statute or rule, unless the taxpayer can demonstrate that the payment was involuntary' ... . Where the payment is 'necessary to avoid threatened interference with present liberty of person or immediate possession of property, the failure to formally protest will be excused' ... . 'Further, where the payment of a tax or fee is based on a material mistake of fact, the payment may be recovered even if it was made without protest' ... . Here, it is undisputed that the plaintiff did not pay the fees under protest." ***Falk v. Nassau County*, 2019 N.Y. Slip Op. 06202, Second Dept 8-21-19**

## ZONING, LAND USE.

ZONING BOARD DID NOT CONSIDER ALL THE STATUTORY FACTORS; DENIAL OF APPLICATION FOR VARIANCES TO ALLOW NEW CONSTRUCTION ANNULLED.

The Second Department, reversing (modifying) Supreme Court, determined the zoning board did not consider all the statutory factors before rejecting Ressa-Cibants' request for variances for new construction: "In determining whether to grant an area variance, a village zoning board must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community (see Village Law § 7-712-b[3][b] ...). In making that determination, the board must consider: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance' (Village Law § 7-712-b[3][b] ... ). Here, the record does not reflect that the Board weighed the benefit to Ressa-Cibants against the detriment to the health, safety, and welfare of the neighborhood by considering the five factors enumerated in the Village Law § 7-712-b(3)(b) ... . In particular, the Board's determinations do not reflect that the Board considered whether there was no feasible method to achieve the benefit sought by Ressa-Cibants without height and coverage area variances." ***Matter of Pangbourne v. Thomsen*, 2019 N.Y. Slip Op. 06159, Second Dept 8-21-19**

# THIRD DEPARTMENT

## CIVIL PROCEDURE, CRIMINAL LAW.

CRIME VICTIMS DO NOT HAVE STANDING TO CHALLENGE A PRISONER'S RELEASE ON PAROLE.

The Third Department, in a full-fledged opinion by Justice Mulvey, over a concurrence and a dissent, determined that the wife of a police officer murdered in 1971 did not, as a crime victim, have standing to bring an Article 78 proceeding challenging the release on parole of Herman Bell, who was convicted of the murder. Crime victims do not have standing to challenge parole determinations: "As noted by one court that has previously addressed the issue before us: 'While a relative of a crime victim may be more emotionally affected by the crime than a member of the general public, that increased emotional effect is not sufficient to confer standing. While statutes have been enacted to permit crime victims the right to be heard at certain proceedings (see [CPL] 380.50), their status as crime victims has not been held to confer standing to them at any proceeding. Executive Law § 259[-]i sets forth the procedures to be followed by the [B]oard of [P]arole. Executive Law § 259[-]i (2) (c) (A) provides that when considering whether or not to grant discretionary parole release, the [B]oard must consider 'any statement made to the [B]oard by the crime victim or the crime victim's representative where the crime victim is deceased[.]' The statute does not authorize any further participation in the process by a crime victim or the representative of a victim. It does not serve to confer standing to a victim who desires to challenge the determination. While the [c]ourt does not question whether the families of the victims of crime continue to suffer real emotional effects, there has not been a showing of any legal right that is affected by the determination which they seek to challenge' ...". ***Matter of Piagentini v. New York State Bd. of Parole*, 2019 N.Y. Slip Op. 06229, Third Dept 8-22-19**

# FOURTH DEPARTMENT

## ANIMAL LAW.

TOWN COURT PROPERLY ORDERED THE EUTHANASIA OF RESPONDENT'S DOG AFTER THE DOG ATTACKED AND REPEATEDLY BIT A THREE-YEAR-OLD CHILD; THE DISSENTER ARGUED PETITIONERS DID NOT ESTABLISH THAT THEIR CHILD SUFFERED SERIOUS INJURY WITHIN THE MEANING OF THE AGRICULTURE AND MARKETS LAW.

The Fourth Department determined Town Court properly ordered the euthanasia of respondent's dog, Wally, after the dog broke free, ran into petitioner's yard, and repeatedly bit a three-year-old girl. The dissenter argued the proof did not demonstrate the child suffered serious injury within the meaning of the Agriculture and Markets Law: "Respondent does not dispute that petitioners established by clear and convincing evidence that her dog is a 'dangerous dog' (Agriculture and Markets Law §§ 108 [24] [a] [i]; 123 [2]). A justice may direct humane euthanasia of a dangerous dog if, inter alia, the dog, without justification, attacks a person, 'causing serious physical injury' (§ 123 [3] [a] ...). The Agriculture and Markets Law defines 'serious physical injury' as 'physical injury which creates a substantial risk of death, or which causes death or serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' (§ 108 [29]). The only issue here is whether the child sustained a 'serious or protracted disfigurement' …. Inasmuch as those terms are used in the Penal Law definition of serious physical injury (see Penal Law § 10.00 [10]), reliance upon criminal cases involving what constitutes a serious or protracted disfigurement is appropriate. As petitioners correctly note, however, the Penal Law definition of a serious injury as, inter alia, a serious and protracted disfigurement ... does not apply here. Contrary to respondent's contention, the evidence establishes that the child sustained a serious injury inasmuch as the dog attack caused serious or protracted disfigurement ... . A 'disfigurement' is 'that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner' ... . 'A person is seriously' disfigured when a reasonable observer would find her altered appearance distressing or objectionable' … . The standard is an objective one and depends on various factors, including the nature and the location of the injury ... . We conclude that the injuries sustained by the child here, particularly the bite wound to the buttocks that required surgery and approximately 30 stitches, constitute serious disfigurement ... . Although the analysis could end there, we conclude that those injuries also constitute a protracted disfigurement ...". ***Matter of Workman v. Dumouchel*, 2019 N.Y. Slip Op. 06248, Fourth Dept 8-22-19**

## APPEALS.

THE WORDING OF THE NOTICE OF APPEAL DID NOT RESTRICT THE APPEAL TO THE DENIAL OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT, BUT RATHER INCLUDED THE GRANT OF SUMMARY JUDGMENT TO DEFENDANT; THE DISSENTER DISAGREED.

The Fourth Department, reversing Supreme Court grant of summary judgment to defendant, over an extensive dissent, determined the notice of appeal did not restrict the appeal to the denial of plaintiff;s cross motion for summary judgment, but rather encompassed the appeal of the grant of summary judgment dismissing the complaint: "... [W]e reject the assertion

of defendant and our dissenting colleague that plaintiff's notice of appeal limits our review to that part of the order and judgment that denied plaintiff's cross motion for partial summary judgment. The notice of appeal provides, in relevant part, that plaintiff 'hereby appeals . . . from the . . . [o]rder and [j]udgment . . . denying [p]laintiff's [c]ross[ m]otion for [s]ummary [j]udgment. Plaintiff appeals from each and every part of said [o]rder denying [p]laintiff's [c]ross[ m]otion.' Contrary to our dissenting colleague's position, inasmuch as the notice of appeal states that plaintiff sought to appeal from 'each and every part' of the order and judgment and does not contain language restricting the appeal to only a specific part thereof, we conclude that the appeal is not limited to review of the denial of plaintiff's cross motion and that the reference thereto simply constitutes language describing the order and judgment ... . Our determination that the reference to the cross motion in the notice of appeal is descriptive and does not constitute evidence that plaintiff excluded from her appeal that part of the order and judgment granting defendant's motion is further supported by the fact that, in her cross motion, plaintiff expressly sought as part of the requested relief '[a]n [o]rder denying defendant's [m]otion for [s]ummary [j]udgment in its entirety. " ***Cline v. Code*, 2019 N.Y. Slip Op. 06251, Fourth Dept 8-22-19**

## ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CONTRACT LAW.

ARBITRATION AWARD TERMINATING SCHOOL PRINCIPAL FOR ALCOHOL ABUSE SHOULD NOT HAVE BEEN VACATED, CRITERIA EXPLAINED.

The Fourth Department reversed Supreme Court and reinstated the arbitration award which terminated petitioner's employment as a school principal for alcohol abuse. The school district had entered a "last chance" agreement with petitioner, which, the Fourth Department held, was not rendered unenforceable by the district's commencement of the disciplinary proceedings. The court explained the criteria applied to review of arbitration awards: "Education Law § 3020-a (5) permits judicial review of a hearing officer's decision but expressly provides that 'the court's review shall be limited to grounds set forth in' CPLR 7511. 'An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' ... . Where, as here, the parties are 'subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny—it must have evidentiary support and cannot be arbitrary and capricious' ... , and 'it must be in accord with due process' ... . Here, petitioner failed to meet his burden to show that the conduct findings were invalid ... . Indeed, the record establishes that those findings were rational, had evidentiary support, and were not arbitrary and capricious, impermissibly based on uncharged conduct, or otherwise improper ...". ***Matter of Bender (Lancaster Cent. Sch. Dist.)*, 2019 N.Y. Slip Op. 06297, Fourth Dept 8-22-19**

## ATTORNEYS.

PLAINTIFF'S ATTORNEY VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY DEPOSING A NONPARTY WITNESS WHEN HER COUNSEL WAS NOT PRESENT, HOWEVER THE VIOLATION DID NOT PREJUDICE DEFENDANTS AND DID NOT THEREFORE REQUIRE DISQUALIFICATION.

The Fourth Department determined the motion to disqualify plaintiff's attorney for deposing an important nonparty witness without counsel present was properly denied. However, Supreme Court should not have precluded further questioning of the witness: " 'Disqualification of a party's chosen counsel . . . is a severe remedy which should only be done in cases where counsel's conduct will probably taint the underlying trial' ... . Here, although plaintiff's attorney improperly engaged in conversations with an allegedly represented nonparty witness, delayed in providing notes regarding one of those conversations, and allegedly misrepresented the nature of one of the conversations, we reject defendants' contentions that plaintiff's attorney has gained any unfair advantage requiring his disqualification. Generally, a violation of the Rules of Professional Conduct, while relevant to the issue whether the attorney's continued participation will taint a case, is not, in and of itself, sufficient to warrant disqualification ... . Based on our review of the records ... , we cannot conclude that plaintiff's attorney obtained any information that he could not have otherwise obtained in the ordinary course of discovery ... . Any improper testimony from the witness at her first deposition would be inadmissible at trial, and we doubt that any knowledge plaintiff's attorney acquired regarding the witness's inadmissible opinions would lead the attorney to develop a novel theory of the case or to uncover otherwise undiscovered information. We thus conclude that disqualification of plaintiff's attorney was not 'necessary in order to rectify the situation and to prevent the offending [attorney] from realizing any unfair advantage' from his conduct ...". ***Harris v. Erie County Med. Ctr. Corp.*, 2019 N.Y. Slip Op. 06352, Fourth Dept 8-22-19**

## ATTORNEYS, CIVIL PROCEDURE.

DEFENDANTS' ATTORNEYS SHOULD NOT HAVE BEEN DISQUALIFIED BECAUSE THEY HAD REPRESENTED PLAINTIFFS' TRUSTEE, A NONPARTY, IN AN UNRELATED MATTER.

The Fourth Department, reversing Supreme Court, over a concurrence, determined that defendants' attorneys, Rupp Baase, should not have been disqualified because the firm had represented a nonparty trustee of plaintiffs on an unrelated matter. The concurrence argued the matter was not justiciable because the court was asked to decide whether there was a conflict of interest between Rupp Baase and a nonparty. The lawsuit stemmed from a fire at plaintiffs' Elks Lodge allegedly caused by a boiler installed by defendants: "... [P]laintiffs 'had to establish that the issues in the present litigation are identical to

or essentially the same as those in the prior representation or that [Rupp Baase] received specific, confidential information substantially related to the present litigation' ... . Even assuming, arguendo, that a prior attorney-client relationship existed between Rupp Baase and the Trustee, we conclude that plaintiffs failed to establish that the interests of defendants in this action are materially adverse to the interests of the Trustee individually, who is not a named party and is merely a trustee of the Lodge. Plaintiffs likewise failed to establish that any alleged prior representation involved issues that were 'identical to or essentially the same' as those in the instant lawsuit … . Although the Trustee asserts that he told Rupp Baase during their alleged representation of him that a fire had occurred on plaintiffs' property due to defendants' boiler installation, a claim that Rupp Baase disputes, we conclude that, even if the Trustee provided that information, it was not 'specific [and] confidential' and thus does not warrant disqualification ... . Because plaintiffs failed to establish that the Trustee's interests are materially adverse to defendants' in this lawsuit and that this lawsuit is substantially related to the alleged prior representation, the court abused its discretion in granting that part of plaintiffs' motion seeking disqualification of Rupp Baase ...". ***Benevolent & Protective Order of Elks of United States of Am. v. Creative Comfort Sys., Inc.*, 2019 N.Y. Slip Op. 06246, Fourth Dept 8-22-19**

## CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO JURISDICTIONAL DISCOVERY WITH RESPECT TO DEFENDANT HOSPITAL IN THIS MEDICAL MALPRACTICE ACTION; HOSPITAL DID NOT CONSENT TO JURISDICTION BY REGISTERING AS A FOREIGN CORPORATION; DOCTORS DID NOT CONSENT TO JURISDICTION BY BECOMING LICENSED IN NEW YORK.

The Fourth Department determined the plaintiff was entitled to jurisdictional discovery with regard to a hospital defendant in this medical malpractice action. The court noted that the hospital did not consent to the general jurisdiction of New York courts by registering as a foreign corporation with the Department of State and the defendant doctors did not consent to New York personal jurisdiction based upon becoming licensed to practice medicine in New York: "... [P]laintiff made a 'sufficient start' in establishing personal jurisdiction over the hospital pursuant to CPLR 301 and 302 (a) (1) to be entitled to disclosure pursuant to CPLR 3212 (f) ... . The record 'is not clear whether [the hospital's] affiliations with the State [of New York] are so continuous and systematic as to render [it] essentially at home in the . . . State' as required for general jurisdiction ... or whether its activities in New York are 'purposeful and [whether] there is a substantial relationship between the transaction and the claim asserted' as required for long-arm jurisdiction ... . However, the record contains evidence that the hospital advertises to prospective New York patients and has at least some relationship with New York providers, New York insurers, and defendant Guthrie Medical Group, P.C., which owns New York offices. The record also contains evidence that the hospital derives substantial revenue from New York residents. Based on that initial showing, we conclude that plaintiff has made a 'sufficient start' by establishing that facts 'may exist to exercise personal jurisdiction' over the hospital, warranting jurisdictional discovery ...". ***Best v. Guthrie Med. Group, P.C.*, 2019 N.Y. Slip Op. 06320, Fourth Dept 8-22-19**

## CIVIL PROCEDURE, EVIDENCE.

CRITERIA FOR A MOTION TO RENEW WERE NOT MET, DISSENTERS ARGUED THE COURT HAD THE DISCRETION TO CONSIDER THE MOTION AS A MOTION TO REARGUE.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the motion to renew should not have been granted. The dissenters argued the motion could have been considered a motion to reargue in the exercise of discretion: "It is well settled that '[a] motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion . . . and, inter alia, that would change the prior determination' (... see CPLR 2221 [e] [2]). Further, '[a]lthough a court has discretion to grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a reasonable justification for the failure to present such facts on the prior motion' ( ...see CPLR 2221 [e] [3]). In particular, '[l]eave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion' ... . ... We reject our dissenting colleagues' conclusion that the court would have been "justified" in exercising discretion to treat the motion to renew as a motion to reargue, and that it effectively did so in granting Camelot's motion. We disagree. There is no justification in this case to 'deem' Camelot's motion as one seeking reargument and we decline to do so because, in our view, Camelot actively foreclosed that avenue of relief.' ***The Walton & Willet Stone Block, LLC v. City of Oswego Community Dev. Off.*, 2019 N.Y. Slip Op. 06245, Fourth Dept 8-22-19**

## CIVIL PROCEDURE, INSURANCE LAW, CONTRACT LAW, NEGLIGENCE, EMPLOYMENT LAW, PRIMA FACIE TORT.

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR BREACH OF CONTRACT, NEGLIGENT HIRING AND SUPERVISION OR PRIMA FACIE TORT.

The Fourth Department, reversing Supreme Court, determined plaintiff, the assignee of no-fault benefits, did not state valid causes of action against the insurer for breach of contract, negligent hiring and supervision, and prima facie tort. The

claims were paid by the defendant and plaintiff alleged flaws and delays in the processing of the claims: "The amended complaint, however, failed to identify the specific insurance contracts that plaintiff had performed services under or the contract provisions that defendant allegedly breached. Inasmuch as bare legal conclusions without factual support are insufficient to withstand a motion to dismiss, we conclude that the amended complaint fails to state a cause of action for breach of contract. ... Although '[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act'... , the amended complaint failed to allege that the acts of defendant's employees were committed independent of defendant's instruction or outside the scope of employment ... . ... 'There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act' ... . Here, the amended complaint alleged that defendant acted in "bad faith" and intentionally caused harm to plaintiff by requesting verifications and examinations under oath. Those conclusory allegations, however, failed to state that defendant had 'a malicious [motive] unmixed with any other and exclusively directed to [the] injury and damage of [plaintiff]' ' ... . Furthermore, it is '[a] critical element of [a prima facie tort] cause of action . . . that plaintiff suffered specific and measurable loss' ...". ***Medical Care of W. N.Y. v. Allstate Ins. Co.*, 2019 N.Y. Slip Op. 06243, Fourth Dept 8-22-19**

## CIVIL PROCEDURE, PRIMA FACIE TORT.

COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT, ELEMENTS EXPLAINED.

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort: " 'Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful' ... . 'The requisite elements of a cause of action for prima facie tort are (1) intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful' ... . Here, the prima facie tort cause of action cannot stand because, although the complaint alleged that defendant 'acted maliciously' and 'with disinterested malice,' it did not allege that defendant's "sole motivation was disinterested malevolence' " ... . In addition, the complaint failed to allege special damages as required ... . Finally, the complaint is not 'sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action' (CPLR 3013 ...). '[A] cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations' ... . Here, the complaint is devoid of relevant facts, including the time period at issue, the number of forms that defendant requested plaintiff to resubmit, and the number of claims involved." ***Greater Buffalo Acc. & Injury Chiropractic, P.C. v. Geico Cas. Co.*, 2019 N.Y. Slip Op. 06349, Fourth Dept 8-22-19**

## CONTRACT LAW.

DEFENDANTS BREACHED THE CONTRACT BY TERMINATING IT WITHOUT GIVING PLAINTIFF THE TIME TO CURE DEFICIENCIES CALLED FOR IN THE CONTRACT.

The Fourth Department determined defendants should not have terminated plaintiff's contract to install a heating system without giving plaintiff the time to cure deficiencies called for by the contract: "... [W]e conclude that plaintiff met its initial burden of establishing that defendants failed to follow the termination for cause procedures in the contract when they, inter alia, did not provide plaintiff seven days to cure deficiencies before terminating the contract, and defendants failed to raise a triable issue of fact with respect thereto ... . 'Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party must comply with them' ... . Here, defendants' failure to allow plaintiff the requisite time to cure before terminating the contract rendered defendants' termination wrongful, and therefore the court erred in denying that part of plaintiff's motion with respect to liability on the breach of contract cause of action ...". ***Black Riv. Plumbing, Heating & A.C., Inc. v. Board of Educ. Thousand Is. Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 06321, Fourth Dept 8-22-19**

## CORPORATION LAW, EVIDENCE.

CELLINO'S PETITION FOR DISSOLUTION OF CELLINO & BARNES PC PROPERLY SURVIVED A MOTION FOR SUMMARY DISMISSAL.

The Fourth Department determined petitioner's (Cellino's) petition for dissolution of the professional corporation (Cellino & Barnes, PC) properly survived a motion for summary dismissal: "... [W]e reject respondents' [Barnes'] contention that the court erred in denying their motion insofar as it sought summary dismissal of the amended petition on the ground that dissolution would not benefit the shareholders because the PC has continued to function effectively and prosperously. The determination whether a corporation should be dissolved is within the discretion of the court (see Business Corporation Law § 1111 [a] ... ), and "the benefit to the shareholders of a dissolution is of paramount importance" in making that determination ... . Although respondents submitted evidence demonstrating that the PC has continued to conduct business at a profit, dissolution is not to be denied in a proceeding brought pursuant to Business Corporation Law § 1104 simply because the corporate business has been conducted at a profit ... or because the dissension has not yet had an appreciable impact

on the profitability of the corporation ... . Here, the record contains ample evidence of dissension and deadlock between petitioner and Barnes, and we conclude that ... petitioner raised issues of fact whether dissension and deadlock have so impeded the ability of the PC to function effectively that dissolution would benefit the shareholders. In a close corporation like the PC, 'the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation' ... . When a point is reached at which the shareholders who are actively conducting the business of the corporation cannot agree, dissolution may be in the best interests of those shareholders ... , and we agree with the court's determination that a hearing should be held to give the parties an opportunity to present their evidence on this controverted issue ...". ***Matter of Cellino v. Cellino & Barnes, P.C.*, 2019 N.Y. Slip Op. 06365, Fourth Dept 8-22-19**

## CRIMINAL LAW.

SENTENCE AFTER TRIAL, WHICH WAS SIX TIMES LONGER THAN THE SENTENCE OFFERED FOR A PLEA, DEEMED UNDULY HARSH AND SEVERE.

The Fourth Department reduced defendant's sentence after trial, in part because it was so much greater than the sentence offered in exchange for a plea: "... [T]he aggregate sentence of 60 years, which is statutorily reduced to 50 years (see Penal Law § 70.30 [1] [c], [e] [vi]), is unduly harsh and severe. Defendant has no prior felony convictions. In addition, the People offered, and the court committed to, a plea deal pursuant to which defendant would plead guilty to one count of criminal sexual act in the first degree and be sentenced to a determinate term of 10 years' incarceration with 20 years' postrelease supervision, which was thereafter reduced to a determinate term of nine years' incarceration with 20 years' postrelease supervision. The court nevertheless sentenced defendant upon his conviction to determinate terms of 15 years of incarceration with 20 years' postrelease supervision for the three counts of criminal sexual act in the first degree and the count of rape in the first degree, all to run consecutively. That aggregates to a sentence that is more than six times longer than that of the most recent plea offer, and we conclude that it is unduly harsh and severe ...". ***People v. Boyd*, 2019 N.Y. Slip Op. 06311, Fourth Dept 8-22-19**

## CRIMINAL LAW.

DEFENDANT'S ABSENCE FROM SIDEBAR CONFERENCES DURING JURY SELECTION DID NOT REQUIRE REVERSAL.

The Fourth Department, over a dissent, determined defendant's absence from sidebar conferences did not require reversal: "Defendant contends that the court violated the rule in People v. Antommarchi (80 NY2d 247, 250 [1992] ...) when it conducted several sidebar conferences in his absence and that reversal is required with respect to two of those conferences. We disagree with defendant that reversal is required as a result of any violation of defendant's Antommarchi rights. It is well settled that a criminal defendant has a statutory right to be present at all material stages of the trial (see CPL 260.20 ...), including the sidebar questioning of a prospective juror when the purpose of the questioning is 'intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses' ... . Nevertheless, 'reversal is not required when, because of the matter then at issue before the court or the practical result of the determination of that matter, the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome' ... . In determining whether the defendant's presence could have afforded him or her such an opportunity, the test is whether the record negates the possibility that the defendant 'could have provided valuable input on his [or her] counsel's apparently discretionary choice to excuse those venire persons' ... . Thus, reversal is not required where the defendant's attorney does not exercise a choice to exclude a prospective juror, such as where a prospective juror is excused for cause or where the People have exercised a peremptory challenge to the prospective juror ... . ... [W]e conclude that defendant had no opportunity to provide any input that might have affected the outcome regarding the relevant prospective jurors." ***People v. Wilkins*, 2019 N.Y. Slip Op. 06238, Fourth Dept 8-22-19**

## CRIMINAL LAW, APPEALS.

TWELVE YEAR SENTENCE FOR CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE THIRD DEGREE DEEMED UNDULY HARSH AND SEVERE, REDUCED TO SEVEN YEARS IN THE INTEREST OF JUSTICE, TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice partial dissent, reduced defendant's sentence in this "criminal possession of a controlled substance third degree" case from 12 to seven years. The period of post-release supervision was reduced from three to one and a half years. Defendant was found in possession of over 35 ounces of cocaine: "... [W]e agree with defendant that, under the circumstances of this case, the resentence is unduly harsh and severe. We therefore modify the resentence as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of seven years and the period of PRS to a period of 1½ years ...". ***People v. Loiz*, 2019 N.Y. Slip Op. 06240, Fourth Dept 8-22-19**

## CRIMINAL LAW, COURT OF CLAIMS.

WRONGFUL CONVICTION ACTION PROPERLY DISMISSED, CONVICTION WAS NOT VACATED ON A GROUND ENUMERATED IN THE COURT OF CLAIMS ACT.

The Fourth Department determined claimant's wrongful conviction action was properly dismissed because claimant's judgment of conviction was not vacated on a ground enumerated in the Court of Claims Act: "... [T]he County Court Judge averred that he vacated claimant's judgment pursuant to CPL 440.10 (1) (f) 'and/or' CPL 440.10 (1) (h). More specifically, the County Court Judge determined that the People had committed a Rosario violation, which falls under CPL 440.10 (1) (f) (see People v. Jackson, 78 NY2d 638, 645 [1991]), 'and/or' a Brady violation, which falls under CPL 440.10 (1) (h) ... . The transcript of the hearing at which the County Court Judge vacated the judgment fully corroborates his sworn account of his rationale for overturning claimant's conviction, and the transcript likewise supports the County Court Judge's averment that he effectively denied claimant's CPL article 440 motion to the extent predicated on any provision of CPL 440.10 (1) other than paragraphs (f) or (h). Thus, because paragraphs (f) and (h) of CPL 440.10 (1) 'are not enumerated in Court of Claims Act § 8-b (3) (b) (ii), the [court] properly dismissed the claim' ... . ... It is possible, as claimant notes, that the facts underlying a successful Brady claim under CPL 440.10 (1) (h) could also give rise to a viable claim of newly discovered evidence under CPL 440.10 (1) (g). That, however, is irrelevant for purposes of Court of Claims Act § 8-b, which allows recovery only where the criminal court actually vacated the judgment on an enumerated ground, and not where the criminal court might have vacated the judgment on an enumerated ground, but did not do so ...". ***Jeanty v. State of New York*, 2019 N.Y. Slip Op. 06333, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE.

GRAND JURY EVIDENCE WAS SUFFICIENT TO SUPPORT ROBBERY FIRST DEGREE DESPITE THE VICTIM'S TESTIMONY THAT HE DID NOT SEE A KNIFE.

The Fourth Department, reversing County Court, determined the evidence presented to the grand jury was sufficient to support the robbery count, despite the victim's testimony he did not see a knife: "... [T]he victim observed a 'small silver ring' in defendant's hand. Although the victim did not see the blade of a knife at that time, he thought that defendant had a knife based upon his observation of the shiny, metal object in defendant's hand that defendant tried to press against or jab toward the victim's stomach. After the victim was able to pull away from defendant and warn him not to further approach, defendant walked away, and the victim called the police to report the crime and provide a description of the suspect. A police officer who responded a few minutes later testified that he apprehended defendant a couple blocks away carrying a Swiss Army knife with the blade extended. ... [W]e conclude that the victim's testimony regarding his observation of the object in defendant's hand during the encounter and the officer's testimony regarding defendant's apprehension close in time and place while carrying a knife is legally sufficient to support a prima facie case of robbery in the first degree with respect to defendant's actual possession of a dangerous instrument ... . Defendant nonetheless challenges the sufficiency of the evidence on the ground that the victim's further testimony that he 'guess[ed]' what he saw 'was the edge of [defendant's] Swiss Army knife that he had' constitutes inadmissible hearsay because the victim was repeating information that he must have obtained from the police regarding the precise nature of the object in defendant's possession. Even assuming, arguendo, that such further testimony by the victim constituted inadmissible hearsay, we note that 'the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment' ... , and that is not the case here given the sufficiency of the remaining evidence ...". ***People v. Rawlinson*, 2019 N.Y. Slip Op. 06354, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE.

IN DENYING A SUPPRESSION MOTION THE JUDGE CAN CONSIDER EVIDENCE SUBMITTED BY THE PEOPLE, EVEN IF THAT EVIDENCE WAS NOT EXPRESSLY RELIED UPON BY THE PEOPLE; OBSERVATION OF WHAT APPEARED TO BE A DRUG TRANSACTION PROVIDED PROBABLE CAUSE; THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT APPLIED; THE INVENTORY SEARCH WAS VALID.

The Fourth Department determined defendant's motion to suppress tangible evidence was properly denied, finding (1) the suppression court could properly consider all the evidence presented by the People, even if the evidence was not expressly relied upon by the People; (2) although the vehicle occupants were seized at the time the police approached, the officers' prior observation of what appeared to be a drug transaction provided probable cause; (3) the search of the vehicle was justified by the automobile exception; and (4) the inventory search was lawful: "... [W]e conclude that the court was entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People (see CPL 710.60 [6] ...). 'By presenting evidence sufficient to support the court's findings, the People met their burden of going forward . . . and the court may rely on any legal justification for police conduct for which there is factual support in the record' ... . ... [B]efore defendant's seizure, an officer observed defendant conduct what, based on his training and experience, appeared to be a hand-to-hand drug transaction, even though he 'couldn't tell' what 'items' he had seen during the exchange other than money. Additionally, that officer was in the area conducting surveillance on an unrelated narcotics investigation, raising the inference that the transaction occurred in a drug-prone area. Furthermore, once two other offi-

cers approached the vehicle based on the above observations, one officer saw packaging material of the kind used to store narcotics, and the other officer observed that the driver of the vehicle engaged in 'furtive' behavior. Based on the totality of those factors, we conclude that the police had probable cause to believe that defendant engaged in a narcotics offense justifying the stop of the vehicle and his arrest ... . ... 'The [automobile] exception requires both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made' ... . Based on the foregoing, at the time of the search, the police had probable cause to believe that narcotics or packaging materials used in the sale and possession of narcotics were present in the vehicle ... . Thus, inasmuch as there was a nexus between the probable cause to search the vehicle and the crime for which defendant was being arrested, we conclude that the police were not required to obtain a warrant ...". ***People v. Nichols*, 2019 N.Y. Slip Op. 06361, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE.

EVIDENCE SUPPORTED THE FIRST DEGREE MURDER CONVICTION BASED UPON DEFENDANT'S HIRING THE KILLER.

The Fourth Department, over a two-justice dissent, determined the evidence supported the first degree murder charge, based upon defendant's hiring the killer. The dissent argued the proof of the contract-killing was insufficient. The second degree murder count should have been dismissed: "We and our dissenting colleagues agree on many points. All of us agree that there was sufficient evidence that defendant was complicit in his wife's murder. Further, all of us agree that there is evidence that the principal requested a payment of money from defendant only five days before the murder. Nevertheless, our dissenting colleagues characterize that request as 'part of a string of otherwise innocent interactions' between defendant and the principal in the days leading up to the murder. The dissent even offers the possibility that the principal was 'seeking a reward' from defendant—not for agreeing to murder defendant's wife, but for unrelated virtuous conduct. We cannot agree. In our view, the jury could rationally have concluded that the principal's request for a payment of money five days before the murder was not "innocent" at all, but in fact was part and parcel of the murder plot." ***People v. Clayton*, 2019 N.Y. Slip Op. 06284, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS NOT IN CUSTODY WHEN HE WAS ASKED POINTED QUESTIONS, NO MIRANDA WARNING REQUIRED; POLICE OFFICER'S SUBJECTIVE BELIEF DEFENDANT WAS NOT FREE TO LEAVE IS IRRELEVANT; RAPE FIRST IS AN INCLUSORY CONCURRENT COUNT OF PREDATORY SEXUAL ASSAULT.

The Fourth Department determined: (1) the defendant was not in custody when he was asked pointed questions so the Miranda warnings were not required; (2) a police officer's subjective belief defendant was not free to leave is not relevant to a Miranda analysis; and (3) rape first degree is an inclusory current count of predatory sexual assault: "... [T]he evidence establishes, inter alia, that defendant was told at the start of the interview that he was not under arrest and would be going home that day ... , and the recording of the interview belies defendant's contention that he was in handcuffs when he was placed in the interview room. Defendant concedes that he indeed was not arrested at the time of the interview, and that he was given a ride home later that day. We reject defendant's contention that, because a police officer testified that defendant was not free to leave during transport to the police station, the court erred in concluding that defendant was not in custody. A police officer's subjective belief 'has no bearing on the question whether a suspect was in custody at a particular time . . . [and] the subjective intent of the officer . . . is irrelevant' where, as here, there is no evidence that such subjective intent was communicated to the defendant' ... . Contrary to defendant's further contention, Miranda warnings were not required before the investigators asked pointed questions. It is well settled that 'both the elements of police custody' and police interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by Miranda' ... , and the element of custody was absent here." ***People v. Baez*, 2019 N.Y. Slip Op. 06294, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE.

FAILURE TO INSTRUCT THE GRAND JURY ON THE DEFENSE OF PROPERTY JUSTIFICATION DEFENSE REQUIRED DISMISSAL OF THE MURDER/MANSLAUGHTER INDICTMENT, TWO JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined County Court properly dismissed the murder/manslaughter indictment because the grand jury was not charged with the defense of property justification defense. After decedent had twice attacked defendant inside the home, the decedent reentered the home from the front yard and was shot by the defendant: "During a recess in the grand jury proceeding, defendant asked the People to deliver to the grand jury foreperson a letter requesting, among other things, that the grand jurors be charged with respect to the justifiable use of physical force in defense of a person pursuant to Penal Law § 35.15 and the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to § 35.20 (3). The People did not deliver the letter to the foreper-

son. The People instructed the grand jury on the law with respect to murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]), and the justification defense pursuant to Penal Law § 35.15; however, the People did not instruct the grand jury with respect to the justification defense pursuant to § 35.20 (3). ... [W]e conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3) ... . A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular 'that the integrity thereof is impaired and prejudice to the defendant may result' (CPL 210.35 [5]; see CPL 210.20 [1] [c]). With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here, that, '[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it.' 'If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment' ... . Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (see CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 ...". ***People v. Ball*, 2019 N.Y. Slip Op. 06295, Fourth Dept 8-22-19**

## CRIMINAL LAW, EVIDENCE, ATTORNEYS.

COUNTY COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS, DEFENDANT PRESENTED EVIDENCE AN ALIBI WITNESS WAS NOT INTERVIEWED; A WITNESS'S RECANTATION WAS PROPERLY FOUND UNBELIEVABLE.

The Fourth Department, reversing County Court, determined a hearing was required on defendant's motion to vacate his conviction on ineffective assistance grounds. The motion alleged that defense counsel did not adequately investigate alibi witnesses. The Fourth Department also held that County Court properly found a witness's recantation of trial testimony unbelievable: "In recognition of the fact that '[t]here is no form of proof so unreliable as recanting testimony' ... , courts have set forth a list of factors to be considered where, as here, the newly discovered evidence is recantation evidence, i.e., '(1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie' ... . Another relevant factor is 'whether the recantation refutes the eyewitness testimony of another witness' ... . ... .. [D]defendant's CPL 440.10 motion was supported by notarized but unsworn statements of two previously unknown individuals who claimed that they would have corroborated the trial testimony of defendant and his mother that defendant was at a party at his mother's home for the entire evening of the shooting. One of those witnesses specifically stated that she was at all times willing to 'make [a] statement' but was never contacted by defense counsel. Two additional witnesses stated that they observed defendant at that party some time after the shooting. While those witnesses do not provide a technical alibi for defendant because they did not discuss defendant's location at the time of the shooting ... , they tend to support the alibi evidence that defendant could not have been the shooter because he was at a party at his mother's house for the entire evening ...". ***People v. Howard*, 2019 N.Y. Slip Op. 06309, Fourth Dept 8-22-19**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

EVIDENCE DID NOT SUPPORT A LEVEL THREE RISK ASSESSMENT, REDUCED TO LEVEL TWO; STANDARD OF PROOF IS PREPONDERANCE NOT CLEAR AND CONVINCING.

The Fourth Department determined there was insufficient evidence to justify a level three risk assessment. The assessment was reduced to level two. The court noted that County Court should have applied the preponderant evidence standard, not a clear and convincing standard: "... [T]he People did not establish by clear and convincing evidence that defendant had the requisite pattern of drug use, and there is no 'indication in the record that drugs . . . played a role in the instant offense' ... . * * * ... [T]he hearsay statement by defendant's ex-wife that he is a "marijuana addict" is entitled to no weight. Not only is that statement conclusory and unsupported by any other evidence, nothing in the record suggests that defendant's ex-wife is qualified to diagnose addiction. * * * ... [T]he court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he 'pleaded guilty, admitted his guilt, appeared remorseful when interviewed in connection with the preparation of a presentence report, and apologized' for his conduct ...". ***People v. Kowal*, 2019 N.Y. Slip Op. 06325, Fourth Dept 8-22-19**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

SORA RISK ASSESSMENT REDUCED TO LEVEL ONE, NO PROOF AGE OF CHILDREN DEPICTED IN PORNOGRAPHY WAS LESS THAN TEN.

The Fourth Department reduced defendant's risk level from two to one, finding there was no proof the children depicted in pornography were less than ten years old: "Defendant was convicted of possessing a sexual performance by a child (Penal Law § 263.16), which requires proof, inter alia, that defendant possessed a play, motion picture, or photograph depicting sexual conduct involving a child who is less than 16 years of age (see §§ 263.00 [1], [4]; 263.16). Consequently, defendant's plea of guilty to that charge does not constitute clear and convincing evidence that 30 points should be assessed under risk factor 5 ... . Additionally, the evidence submitted by the People, including the presentence report, did not constitute clear and convincing evidence that any of the victims was 10 years of age or less ... . The clear and convincing evidence, including the references to the children in the images possessed by defendant in the presentence report as preadolescent or prepubescent, coupled with the report's definition of such children as being between 10 and 13 years of age, however, supports the imposition of 20 points under risk factor 5 ...". ***People v. Spratley*, 2019 N.Y. Slip Op. 06283, Fourth Dept 8-22-19**

## FAMILY LAW, APPEALS, ATTORNEYS.

WHETHER MOTHER VALIDLY WAIVED HER RIGHT TO COUNSEL WAS APPEALABLE BECAUSE THE ISSUE WAS CONTESTED BEFORE MOTHER DEFAULTED BY FAILING TO APPEAR, DESPITE THE FACT THAT MOTHER'S REQUEST TO REPRESENT HERSELF WAS GRANTED; MOTHER WAS ADEQUATELY INFORMED OF THE RIGHTS SHE WAS GIVING UP.

The Fourth Department, over two separate dissents, determined: (1) whether mother was adequately informed of the rights she was giving up by representing herself was appealable because the matter was contested before mother defaulted by failing to appear; (2) the fact mother was granted the right she requested (representing herself) did not preclude her appeal of the adequacy of her waiver of her right to an attorney; (3) mother was adequately informed of the rights she was giving up: "The mother contends ... that Family Court erred in failing to ensure, in response to her request to proceed pro se, that her waiver of the right to counsel was knowing, intelligent, and voluntary. Initially, we conclude that the mother's contention is reviewable on appeal from the orders ... despite her default. CPLR 5511 provides, in relevant part, that '[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party.' Thus, in general, '[n]o appeal lies from an order [or judgment] entered upon an aggrieved party's default'... . Nevertheless, 'notwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those matters which were the subject of contest' before the [trial court]' ... . ... [W]e conclude that '[t]he issue of the mother's waiver of the right to counsel was the subject of contest before . . . [the c]ourt and, therefore, may be reviewed by this Court ...'. * * * ... [M]other was repeatedly advised by the court of the right to counsel, including assigned counsel, and was represented by several attorneys throughout the proceedings. Yet she discharged or consented to the withdrawal of each of those attorneys for her own reasons and ultimately opted to represent herself, even after she was advised that proceeding without the assistance of trained and qualified counsel might be difficult or detrimental and that she would be required to follow the rules of evidence. The mother also demonstrated the ability and preparedness to proceed pro se by, among other things, issuing subpoenas to various witnesses and filing exhibits. The record thus establishes that the court's inquiry was sufficient to ensure that the mother's waiver of the right to counsel was knowing, intelligent, and voluntary ...". ***Matter of DiNunzio v. Zylinski*, 2019 N.Y. Slip Op. 06337, Fourth Dept 8-22-19**

## HUMAN RIGHTS LAW, LANDLORD-TENANT, SOCIAL SERVICES LAW, MUNICIPAL LAW.

REFUSING SECTION 8 VOUCHERS AS RENT PAYMENT VIOLATES THE WEST SENECA FAIR HOUSING CODE.

The Fourth Department, reversing Supreme Court, reinstated a permanent injunction prohibiting the landlord from refusing "Section 8" vouchers for rent, The refusal violated the West Seneca Fair Housing Code (WSFHC) which prohibits discrimination based upon a person's source of income: "WSFHC § 71-3 (A) provides that '[i]t shall be unlawful . . . [t]o refuse to sell or rent or refuse to negotiate for the sale or deny a dwelling to any person because of race, color, religion, sex, age, marital status, handicap, national origin, source of income or because the person has a child or children' … . Remedial legislation such as WSFHC § 71-3 (A) ' should be liberally construed to carry out the reforms intended and to promote justice' ... . ' A liberal construction . . . is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute [or ordinance], though actually it is not within the letter of the law' ... . We conclude ... that Section 8 vouchers constitute a 'source of income' under WSFHC § 71-3 (A). Such vouchers are plainly a recurrent benefit, measured in terms of money, that constitute financial gain to the recipient. Although the term 'source of income' is undefined in the WSFHC, similar ordinances enacted in other local codes have expressly included

Section 8 vouchers as a source of income ... , which suggests that such vouchers are a 'source of income' under the broad language of the WSFHC." ***People v. Ivybrooke Equity Enters., LLC*, 2019 N.Y. Slip Op. 06299, Fourth Dept 8-22-19**

## INSURANCE LAW, PERSONAL INJURY.

IN A TRIAL SUBJECT TO INSURANCE LAW § 5102 THE TERM "SERIOUS INJURY" NOT "INJURY" SHOULD BE USED ON THE VERDICT SHEET.

The Fourth Department noted that the term "serious injury" not "injury" should be used on a verdict sheet in a case involving Insurance Law 5102: "... [W]e ... note that the first question on the verdict sheet — i.e., "[w]as the accident . . . a substantial factor in causing an injury to [plaintiff]?" — invites the very problem we addressed in Brown v. Ng (163 AD3d 1464, 1465 [4th Dept 2018]), where we noted that an interrogatory asking whether the plaintiff sustained an 'injury' fails to address the appropriate legal issue, which is whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). The first question on the verdict sheet was unnecessary here inasmuch as the second and third questions asked the jury to determine whether plaintiff sustained a serious injury under the relevant categories that was causally related to the accident." ***McCulloch v. New York Cent. Mut. Ins. Co.*, 2019 N.Y. Slip Op. 06254, Fourth Dept 8-22-19**

## LABOR LAW-CONSTRUCTION LAW. PERSONAL INJURY.

MERELY LOSING ONE'S BALANCE AND FALLING FROM A LADDER DOES NOT GIVE RISE TO LIABILITY UNDER LABOR LAW § 240(1).

The Fourth Department, reversing Supreme Court, determined plaintiff was not entitled to summary judgment in this Labor Law §§ 240(1), 241(6) and 200 action. There were questions of fact about how the accident happened, whether the plaintiff was employed by a defendant, whether that defendant was employed by the owner, and whether defendant had authority or control over the site or plaintiff. In addition neither the complaint nor the bill of particulars cited a specific Industrial Code violation. The court noted than merely losing one's balance and falling off a ladder does not give rise to liability under Labor Law 240 (1): "A defendant is not liable on a Labor Law § 240 (1) cause of action unless it is an owner or 'a general contractor or an agent of an owner or general contractor with the authority to supervise and control the work of . . . the injured plaintiff' ... and, in order for the statute to apply, 'a plaintiff must demonstrate that he [or she] was both permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or . . . agent [thereof]' ... . ... Defendant would not be liable under Labor Law § 240 (1) if plaintiff merely lost his balance and fell off a ladder ...". ***Pelonero v. Sturm Roofing, LLC*, 2019 N.Y. Slip Op. 06327, Fourth Dept 8-22-19**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF POSITIONED THE SCAFFOLD SUCH THAT IT TIPPED WHEN A WHEEL WENT THROUGH A HOLE IN A DRAIN GRATE, HE WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Fourth Department, reversing (modifying) Supreme Court, over a dissent, determined that plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff had positioned the scaffold on a drain grate and the scaffold tipped when a wheel went through a hole in the grate: " [T]he relevant and proper inquiry is whether the hazard plaintiff encountered . . . was a separate hazard wholly unrelated to the hazard which brought about [the] need [for a safety device] in the first instance' ... . Here, it is undisputed that the scaffold on which plaintiff was standing tipped over because one of its wheels was placed over an open floor drain hole. The fact that the scaffold tipped and plaintiff fell to the ground 'demonstrates that it was not so placed . . . as to give proper protection to [him]' ... . We therefore conclude that plainti'ff's accident was caused by an elevation-related risk as contemplated in section 240 (1) ... . We reject defendant's contentions that the sole proximate cause of the accident was plaintiff's failure to observe the drain hole and position the scaffold in such a manner to avoid it. '[T]here can be no liability under [Labor Law § ] 240 (1) when there is no violation and the worker's actions . . . are the sole proximate cause' of the accident' ... , and '[a] defendant is entitled to summary judgment dismissing a Labor Law § 240 (1) cause of action or claim by establishing that . . . the plaintiff's conduct was the sole proximate cause of the accident' ... . Plaintiff submitted the testimony of four witnesses, including the project superintendent of the subcontractor that installed the drain and the project manager and superintendent of the subcontractor that installed the concrete floor and curing blanket. Each testified that a temporary cover should be placed over an open drain during the installation of the concrete floor, and therefore plaintiff established that a statutory violation, i.e., the placement of the scaffold over the improperly covered drain hole, was a proximate cause of the accident ... . Thus, even assuming, arguendo, that plaintiff was negligent in failing to observe the drain hole and positioning the scaffold over it, we conclude that his 'actions . . . render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]' ... . 'Because plaintiff established that a statutory violation was a proximate cause of [his] injury, [he] cannot be solely to blame for it' ...". ***Wolf v. Ledcor Constr. Inc.*, 2019 N.Y. Slip Op. 06263, Fourth Dept 8-22-19**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS KILLED WHEN A HEAVY PIECE OF EQUIPMENT HE WAS WELDING FELL; ALTHOUGH THE EQUIPMENT WAS FABRICATED FOR A POWER PLANT BEING CONSTRUCTED IN NEW HAMPSHIRE, PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK WITHIN THE MEANING OF LABOR LAW § 240(1).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff was not involved in an activity covered by Labor Law 240 (1) when he was pinned and killed by a piece of equipment he was welding. Plaintiff was engaged in fabricating a rotor compartment which was to be installed in a power plaint in New Hampshire. Plaintiff and the dissent argued plaintiff's work was part of the New Hampshire construction project: "We conclude that defendants thus established that decedent was not engaged in a covered activity under Labor Law § 240 (1) inasmuch as he was performing his 'customary occupational work of fabricating' and welding a rotor compartment 'during the normal manufacturing process' at the plant in Wellsville, and was not involved in the construction project in New Hampshire nor involved in renovation or alteration work on the plant in Wellsville ...". ***Preston v. APCH, Inc.*, 2019 N.Y. Slip Op. 06236, Fourth Dept 8-22-19**

## MUNICIPAL LAW, CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE ACCEPTED GRAND JURY REPORTS RE: THE ALLEGED MISCONDUCT, NONFEASANCE OR NEGLECT IN OFFICE OF THREE PUBLIC OFFICIALS; THE PROSECUTOR DID NOT INSTRUCT THE GRAND JURY ON THE SUBSTANTIVE ASPECTS OF THE PUBLIC OFFICIALS' DUTIES.

The Fourth Department, reversing County Court, determined that the grand jury reports concerning the alleged misconduct, nonfeasance or neglect in office of three public officials should not have been accepted by County Court. The reports were therefore sealed: "... County Court erred in directing the public filing of three grand jury reports that accused each appellant respectively of misconduct, nonfeasance, or neglect in office (see generally CPL 190.85 [1] [a]). ... 'It is incumbent upon the prosecutor to instruct the [g]rand [j]ury regarding the duties and responsibilities of the public servant . . . target[ed by] the probe' ... .'Without a charge as to the substantive aspects of the official's duties, it [is] not only impossible for the [g]rand [j]ury to determine that the public servant was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for it allow[s] the [g]rand [j]ury to simply substitute its judgment for that of the public servant' ... . Here, the prosecutor failed to provide the grand jury with any instructions regarding appellants' substantive duties in office." ***Matter of May/June 2018 Oneida County Grand Jury Report (John Doe #1)*, 2019 N.Y. Slip Op. 06356, Fourth Dept 8-22-19**

## MUNICIPAL LAW, LANDLORD-TENANT, UTILITIES.

UNDER THE TERMS OF THE LEASE AND VILLAGE REGULATIONS, THE HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AS THE OWNER OF PROPERTY ABANDONED BY THE TENANT, IS RESPONSIBLE FOR THE UNPAID WATER CHARGES INCURRED BY THE TENANT.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined Herkimer County Industrial Development Agency (HCIDA) as the owner of property which had been abandoned by the tenant was responsible to the Village for water charges incurred by the tenant: "... [W]here, as here, an owner 'consents to the tenant's using water in [a] building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the [municipality's] water main, the owner assents to the [municipality's] supplying water to the tenant for use in the building' ... . In the case before us, it appears that the water pipes of the facility that were connected to the Village's water mains 'were installed by the owner of the [facility], if not by the present owner, [HCIDA], then by [its] predecessor in title and the connection was never shut off or disconnected by [HCIDA],' and we note that '[t]he only purpose of maintaining a connection between [the facility] and the [Village's] water mains [was] to have the [Village] supply the [facility] with water'... . Moreover, the lease contemplated that the tenant would incur utility charges as part of its operation, use, and occupancy of the leased facility. 'When such assent [to] or arrangement [for the tenant's use of water] is made, it must be deemed to be made with a view to the existing law' ... . We therefore must evaluate the existing law at the time of HCIDA's assent to the Village supplying water to the tenant in order to determine whether liability for the unpaid water rents may be imposed upon HCIDA. ... ... [U]nder the section entitled 'Liability for Water Service,' Rule No. 7 of the [Village] regulations provides that '[a]ll bills, whether for use of water or repairs to water service, are a charge against the owner of the premises or property where the water is used, and said bills will be rendered to the owner or occupant of said premises.' Under the same section, Rule No. 8 provides, in pertinent part, that '[a]ll bills for the use of water become due and payable and are a lien on the premises where the water is used' and that '[f]ailure to receive bills for said water services . . . does not relieve the owner and/or consumer from liability to pay.' ... Upon construing the regulations as a whole and according to the ordinary and plain meaning of the words therein, we conclude that the regulations provide for the imposition of liability on property owners for water consumed on such property and supplied by the Village." ***Herkimer County Indus. Dev. Agency v. Village of Herkimer*, 2019 N.Y. Slip Op. 06237, Fourth Dept 8-22-19**

## PERSONAL INJURY, CONTRACT LAW, MUNICIPAL LAW.

THE SOIL CONSERVATION AND WATERSHED BOARD'S MOTION FOR SUMMARY JUDGMENT IN THIS DROWNING CASE WAS PROPERLY DENIED, PLAINTIFF'S DECEDENT DIED AFTER GOING OVER A SUBMERGED DAM; ALTHOUGH THE BOARD WAS NOT LIABLE PURSUANT TO A CONTRACT TO MAINTAIN AND OPERATE THE DAM UNDER AN ESPINAL EXCEPTION, THERE WAS A QUESTION OF FACT WHETHER THE BOARD OWNED THE DAM (A DANGEROUS CONDITION); THE BOARD IS SEPARATE AND DISTINCT FROM THE CONSERVATION DISTRICTS; THE ASSUMPTION OF THE RISK DOCTRINE IS NOT APPLICABLE.

The Fourth Department determined soil the soil conservation and watershed board's motion for summary judgment in this wrongful death case was properly denied. The board operated and maintained a dam pursuant to a contract with a federal agency, the Natural Resources Conservation Service (NRCS). The dam was submerged and plaintiff's decedent sustained drowning injuries which led to his death after he waded into the water and went over the dam. Supreme Court should not have held that the board had entirely displaced the NRCS responsibilities for operation and maintenance of the dam (and therefore was liable under contract pursuant the third Espinal exception). However the board did not demonstrate it did not own the dam and summary judgment was properly denied on that ground. In addition the board was separate and distinct from the conservation districts. So granting summary judgment to the districts did not require the same relief for the board. Finally the court noted that the assumption of risk doctrine applies only to sporting events and had no applicability to these facts: "... '[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' (Espinal, 98 NY2d at 138) although, as relevant here, the third exception to that rule applies where the contracting party has 'entirely displaced the other party's duty to maintain the premises safely' ... . * * * We ... conclude that 'the contract between [the Board] and the [NRCS] was not so comprehensive and exclusive that it entirely displaced the [NRCS's] duty to maintain the premises safely, such that [the Board] owed a duty to [decedent]' ... . ... While the Board established that it did not own the creek or the banks adjacent thereto ... , its submissions are insufficient to establish as a matter of law that it did not own the subject dam, which allegedly constituted and created the dangerous condition ... . The Court of Appeals has made clear that, '[a]s a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues' ... . Here, decedent was not engaging in a sporting event or recreative activity that was sponsored or otherwise supported by the Board, nor was he wading and swimming at a designated venue ...". ***Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 2019 N.Y. Slip Op. 06343, 8-22-19**

## PERSONAL INJURY, EVIDENCE.

NO QUESTION OF FACT WHETHER ICY CONDITION EXISTED BEFORE THE STORM, STORM IN PROGRESS RULE WARRANTED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE, TWO-JUSTICE DISSENT.

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined defendants demonstrated they were entitled to summary judgment under the storm in progress rule. The dissenters argued there was a question of fact whether the icy condition was there before the storm: "... [W]e conclude that defendants established as a matter of law 'that a storm was in progress at the time of the accident and, thus, that [they] had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm' ... . Where, as here, a defendant's own submissions do not raise an issue of fact whether the icy condition existed before the storm, the burden shifts to the plaintiff 'to raise a triable issue of fact whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition' ... . Contrary to plaintiff's contentions, nothing in her deposition testimony, which was submitted by defendants in support of their respective motions, raised a triable issue of fact whether the ice she allegedly observed existed before the storm ... , and the evidence that plaintiff submitted in opposition to the motions also did not raise a triable issue of fact." ***Battaglia v. MDC Concourse Ctr., LLC*, 2019 N.Y. Slip Op. 06310, Fourth Dept 8-22-19**

## PERSONAL INJURY, EVIDENCE.

AN ADULT GUEST'S ACT OF POURING KEROSENE ONTO AN ACTIVE FIRE IN A FIRE PIT AT DEFENDANTS' HOME WAS THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S BURN INJURIES; THE DISSENTER ARGUED THERE WAS A QUESTION OF FACT WHETHER A DUTY TO CONTROL THE GUEST'S BEHAVIOR WAS BREACHED.

The Fourth Department, over a dissent, determined the sole proximate cause of plaintiff's burn injuries was a guest's (Gray's) pouring kerosene onto an active fire in a fire pit at defendants' home. All parties were adults. The mere presence of kerosene at the home did not constitute a dangerous condition. The dissenter argued defendant-parent did not demonstrate his daughter did not breach a duty to control the conduct of Gray: "Although plaintiff correctly contends that defendants owed him a duty of care as a guest on their property ... , defendants' submissions establish that they did not breach their

duty to 'act as . . . reasonable [persons] in maintaining [the] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' ... . All attendees of the gathering at defendants' property on the night of the incident were adults, and it was not unreasonable for defendants to allow the small group of adults to use the premises for an unsupervised gathering around a fire pit." ***Bavisotto v. Doldan*, 2019 N.Y. Slip Op. 06247, Fourth Dept 8-22-19**

## MEDICAL MALPRACTICE, CONSTITUTIONAL LAW, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

EMERGENCY PHYSICIAN ERRONEOUSLY PRONOUNCED PLAINTIFF'S DECEDENT DEAD AND ALLEGEDLY REFUSED TO REEXAMINE HIM FOR NEARLY THREE HOURS, DESPITE THE PLEAS OF HIS FAMILY MEMBERS WHO ALLEGEDLY SAW HIM BREATHING, MAKING EYE CONTACT AND MOVING; SUPREME COURT SHOULD NOT HAVE PROHIBITED THE PARTIES FROM MAKING STATEMENTS ABOUT THE FACTS OF THE CASE; THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined Supreme Court should not have prohibited the parties and their attorneys from making statements about the underlying facts in this medical malpractice action, and the negligent infliction of emotional distress (NIED) cause of action should have been dismissed. Plaintiff's decedent suffered cardiac arrest and was pronounced dead by an emergency physician (Perry). However plaintiff's decedent was not in fact dead and the emergency physician refused to examine plaintiff's decedent for nearly three hours. Plaintiff's decedent subsequently died after surgery at another hospital: "Perry notified plaintiff that decedent had died, and plaintiff, along with decedent's son and several other family members, was brought into the code room. Plaintiff alleges that, for the next two hours and 40 minutes, decedent was breathing, making eye contact, and moving around, which prompted her and the coroner to urge Perry and the nursing staff to examine decedent, but they refused to do so. When Perry examined decedent at 11:10 p.m. at plaintiff's insistence, he observed that decedent was, in fact, alive. Decedent was transferred to another hospital, where he underwent heart surgery and subsequently died. * * * Supreme Court erred in granting defendants' motions for an order enjoining and prohibiting the parties and their attorneys from making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media. Although defendants met their burden of 'demonstrat[ing] that such statements present a reasonable likelihood' of a serious threat to [defendants'] right to a fair trial' ... , there is no evidence in the record 'that less restrictive alternatives would not be just as effective in assuring the defendant[s] a fair trial' ... . Absent 'the requisite showing of a necessity for such restraints,' a court may not impose prior restraints on First Amendment rights ... . * * * We agree with defendants ... that the court erred in denying their motions insofar as they sought summary judgment dismissing the ... causes of action ... for NIED ... . . 'A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred' ... when the mental injury is a direct, rather than a consequential, result of the breach' ... and when the claim possesses some guarantee of genuineness' ... . Here, defendants met their respective burdens of establishing as a matter of law that plaintiff and decedent's son did not suffer mental and emotional injuries causally related to Perry's erroneous pronouncement of decedent's death, and plaintiff failed to raise a triable issue of fact by demonstrating the requisite ' guarantee of genuineness' with respect to her claims of mental or emotional injuries ...". ***Cleveland v. Gregory C. Perry, M.D., FDR Med. Servs., P.C.*, 2019 N.Y. Slip Op. 06306, Fourth Dept 8-22-19**

## REAL PROPERTY TAX LAW (RPTL), MUNICIPAL LAW.

MAINTENANCE FEES IMPOSED BY THE TOWN FOR TRIMMING AND REMOVING BRUSH ON PRIVATE PROPERTY ARE NOT TAXES, THEREFORE THE TOWN IS NOT ENTITLED TO CREDIT FROM THE COUNTY FOR UNPAID MAINTENANCE FEES, TWO JUSTICE DISSENT.

The Fourth Department, reversing Supreme Court, over a two justice dissent, determined that maintenance fees imposed by the town for trimming and removing brush from private property are not taxes. Therefore the town cannot seek credit from the county for unpaid maintenance fees: "Section 936 (1) of the RPTL provides that the county guarantees the town's 'taxes' by crediting the town 'with the amount of . . . unpaid delinquent taxes. ' The question raised on this appeal is whether the maintenance charges are "taxes" for the purposes of RPTL 936 and thus whether the County respondents must credit the Town petitioners for the amount of any such charge that goes unpaid or is delinquent. The maintenance charges are assessed against individual properties for their benefit and thus do not fall within the general definition of 'tax,' which instead contemplates 'public burdens imposed generally for governmental purposes benefitting the entire community' ... . Nor do those charges constitute 'special ad valorem levies' as defined by RPTL 102 (14). A ' [s]pecial ad valorem levy' is 'a charge imposed upon benefitted real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service' … . Although the definition of 'tax' does, in certain enumerated circumstances, include 'special ad valorem levies' (RPTL 102 [20]), the maintenance

charges are not special ad valorem levies because they are not used to defray the cost of a 'special district improvement or service' (RPTL 102 [14]). Maintenance charges also are not assessed 'ad valorem' because the amount of the charge is not based on property value but is instead based on the actual expense to the town. Moreover, assuming, arguendo, that the charges are 'special assessments' as defined by RPTL 102 (15), we note that the definition of 'tax' specifically excludes 'special assessments' (RPTL 102 [20]).'' ***Matter of Town of Irondequoit v. County of Monroe*, 2019 N.Y. Slip Op. 06235, Fourth Dept 8-22-19**

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